

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 303 of 1979

with

FIRST APPEAL No 304 of 1979

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

PATEL MANJI THAKERSHI

Versus

KANTA RUGNATH LOHANA

Appearance:

1. First Appeal No. 303 of 1979
MR DD VYAS for Petitioners
MR J.R. NANAVATI for Respondent No. 1
Rest of the respondents served.
2. First AppealNo 304 of 1979
MR DD VYAS for Petitioners
MR J.R. NANAVATI for Respondent No. 1
Rest of the respondents served.

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 22/01/98

COMMON ORAL JUDGEMENT

Both these appeals arise out of a common judgment and decrees passed in Special Civil Suit No. 75 of 1971 and Special Civil Suit No. 87 of 1971 by the learned Joint Civil Judge, Senior Division, Junagadh, on 31st January, 1979.

1. The appellants before this Court are plaintiffs in Special Civil Suit No. 75 of 1971 and defendants nos. 2 and 3 in Special Civil Suit No. 87 of 1971. The suits relate to the land bearing Survey No. 127/1 admeasuring 19 acres 35 gunthas, situated at village Talala. Village Talala was a part of erstwhile State of Junagadh and the land belonged to one Sidi Nasar Amar. Said Sidi Nasar had two sons, namely, Amar Nasar and Abu Nasar. It appears that during the life time of said Sidi Nasar, Amar Nasar had left the village Talala and had settled down at village Jambur and the suit land was being cultivated by Abu Nasar. Amar Nasar had one daughter, named Bai Nathi Amar (the defendant no.1 in Special Civil Suit No. 87 of 1971). Said Bai Nathi Amar along with one Murjana Abu and Hirbai Abu (widow and daughter respectively of Abu Nasar) instituted a suit being Special Civil Suit No. 31 of 1966 (hereinafter referred to as the Suit of 1966) in the Civil Court at Veraval, against Abdulla Nasar (son of Abu Nasar) for partition and share in the suit land. Pending the said suit, on 30th June, 1967, Bai Murjana and Abdulla Abu sold a piece of land admeasuring 4 acres out of the suit land to one Kantaben Rughnath, the plaintiff in Special Civil Suit No. 87 of 1971. A sale deed (Exh.62) was executed and was registered also. The said sale deed does refer that all the three had undivided share in the suit land admeasuring 19 acres 35 gunthas and out of the said land, 4 acres were sold to Kantaben Rughnath for a sum of Rs.10,000/- . Thus pending the Suit of 1966, part of the suit land was transferred to Bai Kantaben Rughnath, however, she was not joined as party respondent in the said proceedings. Ultimately, the said suit was compromised. A compromise purshis (Exh.101) was submitted to the Court and a preliminary decree (Exh.104) in terms of compromise purshis was passed on 20th December, 1967. A final decree was passed on 18th April, 1970. Under the said compromise, Bai Nathi was given half the land and the descendants of Abu Nasar were given half of the suit land to be distributed amongst them in the proportion mentioned in the compromise purshis. After passing of the final decree on 18th April, 1970, as aforesaid, Bai Nathi sold her undivided share in the suit land to the present appellants by a sale deed executed on 6th August, 1970. Pursuant to the said sale deed, the

appellants filed an execution proceeding and claimed half share of the suit land being the successor-in-title to Bai Nathi. The Collector divided the suit land and allotted one half of the land and handed over a piece of land admeasuring 8 acres 12 gunthas to the appellants.

2. Bai Kantaben Rughnath instituted Regular Civil Suit No. 116 of 1971 before the learned Civil Judge, Senior Division, Veraval and prayed for permanent injunction against the appellants. The said suit was withdrawn by Bai Kantaben Rughnath. The appellants, thereafter instituted above Special Civil Suit No. 75 of 1971 for permanent injunction against Bai Kantaben Rughnath and Bai Kantaben instituted above Special Civil Suit No. 87 of 1971 challenging the compromise decree passed in Suit of 1966. Both the suits were tried together. The suit instituted by Bai Kantaben Rughnath was allowed and the trial Court declared that the compromise purshis (Exh.101) dated 20th December, 1967, the preliminary decree (Exh.104) dated 20th December, 1967 and the final decree dated 18th April, 1970 passed in Special Civil Suit No. 31 of 1966 and the execution proceedings dated 18th December, 1970 were not binding to the right, title or interest of Bai Kantaben Rughnath, in so far as, the suit land admeasuring 4 acres was concerned. The Court further declared the sale deed dated 6th August, 1970 (Exh.102) as illegal, null and void and not binding to the right, title and interest of Bai Kantaben Rughnath. The suit instituted by the present appellants was dismissed.

3. The learned trial Judge has recorded a finding that Bai Nathi was a step-daughter of Amar Nasar. He has further concluded that the land was governed by the Junagadh Land Revenue Code. Under the provisions contained in the said Code, the person actually cultivating the land alone have inherited the land from the predecessor-in-title. Since Abu Nasar was the only son of Nasar Amar who was cultivating the suit land alone could have inherited the land. Thus, in any view of the matter, Amar Nasar having not cultivated the suit land, Bai Nathi could not have claimed a share through him. Further, Bai Nathi, being the step-daughter of Amar Nasar could not have claimed a share in the suit land. The learned trial Judge has also examined the provisions of the Mohammadan Law by which the parties to the Suit of 1966 were governed. The learned Judge has come to the conclusion that even under the Mohammadan Law, Bai Nathi could not have claimed a share of more than 5 acres of the suit land. Keeping these findings in view, the learned Judge has held that the compromise decree under

which Bai Nathi was given a share larger than what was lawfully due to her, was a collusive decree and was not binding to Bai Kantaben Rughnath.

4. Mr. D.D.Vyas, the learned Advocate appearing for the appellants has submitted that the learned trial Judge has erred in holding that the compromise decree was a collusive decree. He has submitted that, Bai Kantaben Rughnath had purchased 4 acres out of the suit land from the undivided share of Bai Murjana and Abdulla Abu, on 30th June, 1967, i.e. pending the Suit 31 of 1966. He has, therefore, submitted that the rule of 'lis pendens' would apply and the decree passed in Suit of 1966 would be equally binding to Bai Kantaben Rughnath as well. He has further submitted that the learned trial Judge has erred in holding that the rule of 'lis pendens' would not apply in the instant case. He has submitted that the learned trial Judge has relied upon an amendment made to Section 52 of the Transfer of Property Act, 1882 by the Government of Bombay in the year 1939. He has submitted that the said amendment applied to the areas which were included in the then province of Bombay. The land situated within the erstwhile State of Junagadh cannot be governed by the said amendment. He has further submitted that the appellants had purchased the undivided share of Bai Nathi, admeasuring 8 acres 12 gunthas in the suit land. While Bai Kantaben Rughnath had purchased undivided share of Bai Murjana and Abdulla Abu, admeasuring 4 acres, in the suit land, there possibly cannot be a conflict of interest amongst the appellants and Bai Kantaben Rughnath. In the event there were any objection against the appellants' taking over possession of the share of Bai Nathi in the suit land, the same were required to be raised in the execution proceedings. In view of Section 47 of the Code of Civil Procedure, any suit raising such objection would not be maintainable. The learned trial Judge, therefore, ought to have dismissed the Special Civil Suit No. 87 of 1971. In support of his contentions, Mr. Vyas has relied upon the judgments of the Bombay High Court in the matter of NARAYAN LAXMAN AYARKAR AND ORS. v VISHNU WAMAN DHAWALE AND ANR., (AIR 1957 BOMBAY 117) and in the matter of DIGAMBARRAO HANMANTRAO DESHPANDE v. RANGRAO BAGHUNATHRAO DESAI AND ANR., (AIR 1949 Bombay 367). He has also relied upon two Supreme Court judgments in the matter of NAGUBHAI AMMAL AND ORS., v. B.SHAMA RAO AND ORS., (AIR 1956 S.C. 593) and in the matter of KHEMCHAND SHANKAR CHOUDHARY AND ANR. v. VISHNU HARI PATIL AND ORS., (AIR 1983 S.C. 124).

5. Mr.J.R.Nanavati, the learned Advocate has

appeared for Bai Kantaben Rugnath and has contested the appeals. He has supported the judgment of the learned trial Judge. He has submitted that as such, Bai Nathi was not entitled to a share in the suit land. However, even if it were held that Bai Nathi was entitled to a share in the suit land, undisputedly under the compromise decree she has been given a share much larger than what she would have been entitled to under the law. The presumption, therefore, should be that the suit of 1966 was a collusive one and the compromise decree has, therefore, rightly been set aside by the learned trial Judge. He has also referred to the amendment made under the then Bombay Government under Section 52 of the Transfer of Property Act and has submitted that, in view of the said amendment, the rule of lis pendens would not apply to the suit land. Both the learned Advocates have relied upon the commentary on lis pendens from the Transfer of Property Act by Mulla, 8th Edition.

6. In the matter of Narayan Laxman Ayarkar (*supra*), the learned Judges of the Bombay High Court have discussed the principle of lis pendens in paragraph 6 of the judgment. The learned Judges have held that: "Section 52 of the Transfer of Property Act makes transfers during the pendency of any suit or proceeding, which is not collusive of any right of immoveable property which is directly and specifically in question, ineffective as against the person who may ultimately be declared entitled thereto, except where the transfer has been effected under the authority of the Court." In the matter of Digambarrao Hanmantrao Deshpande (*supra*), the Court has examined the principle of lis pendens. In paragraph 12 of the judgment the Court has held that: "lis pendens is an action pending and the doctrine of lis pendens is that an alienee pendente lite is bound by the result of the litigation." The Court has further held in paragraph 13 that: "It is also settled law that in the absence of fraud or collusion the doctrine of lis pendens applies to a suit which is decided ex parte or by compromise. If the compromise has not been fairly and honestly obtained, the suit which ended in a compromise will not operate as lis pendens. This is the doctrine of lis pendens." In the matter of Nagubai Ammal (*supra*), the Supreme Court has explained the difference between a collusive proceeding and a fraudulent proceeding. The Court has held as under:

"There is a fundamental distinction between a proceeding, which is collusive and one which is fraudulent. Collusion in judicial proceeding is a secret arrangement between two persons that the

one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. (Wharton's Law Lexicon, 14th Edn., p. 212). In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties.

But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the Court in his favour and against his opponent by practising fraud on the court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and earnest."

In the matter of Khemchand Shankar Chaudhary (*supra*), in paragraph 6 of the judgment, the Court has held that: "A transferee pendente lite of an interest in an immovable property which is the subject matter of a suit from any of the parties to the suit will be bound in so far as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Civil Procedure Code clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings."

7. On perusal of the commentary on Transfer of Property Act by Mulla read over by Mr. Vyas as well as on perusal of the above referred judgments, it is abundantly clear that the rule of *lis pendens* would apply to any transfer pendente lite.

8. It is undisputed that Bai Kantaben Rugnath purchased 4 acres of land from the undivided share of Bai Murjana and Abdulla Abu in the suit land pending the suit of 1966. In my view, the decree passed, be it a compromise decree, in the suit is binding to Bai Kantaben Rugnath as much as it should bind the transferors Bai

Murjana and Abdulla Abu. The question is, therefore, whether the said compromise decree was obtained by collusion as averred by Mr. Nanavati. The learned trial Judge has solely relied upon the fact that Bai Nathi was otherwise not entitled to any share in the suit land or if at all she was entitled to any share, it could not have been more than 5 acres of the suit land. I am afraid, I cannot accept the view expressed by the learned trial Judge. Merely because a compromise is more favourable to one of the parties, the same cannot be said to be obtained by collusion. For a proceeding being collusive, what is required is, there must be a pre-meditation and the proceeding should have been initiated with an intention to cause injury to a third party who is not a party to the proceeding. In the present case, the suit of 1966 was instituted by Bai Murjana, Bai Nathi and Hirbai against Abdulla Abu. Bai Kantaben was not connected in any manner with the said suit. Besides, the undivided share admeasuring 4 acres was sold by Bai Murjana and Abdulla Abu to Bai Kantaben Rughnath pending the suit. Bai Nathi was nowhere concerned with the said sale. Therefore, it cannot be held that the suit was instituted with a view to causing injury to Bai Kantaben Rughnath. It, therefore, cannot be said that the suit was collusive nor can it be said to be fraudulent. No fraud has been perpetrated by either of the parties upon any one of the parties to the proceeding or upon the Court in getting the compromise decree passed. I am, therefore, of the view that the suit of 1966 can neither be said to be collusive nor fraudulent. The compromise decree passed therein, therefore, could not have been quashed and set aside as has been done by the learned trial Judge. Upon perusal of the amendment to Section 52 of the Transfer of Property Act, 1882, brought in by the Bombay Act No.4 of 1939, it is apparent that the said amendment applied to the areas governed by the then Government of Bombay. The suit land being situated in the State of Junagadh could not have been governed by the said amendment. The learned trial Judge, therefore, is not right in holding that the principle of rule of lis pendens would not apply in respect of the suit land. In view of the above view taken by me, I need not answer whether the Special Civil Suit No. 87 of 1971 instituted by Bai Kantaben Rughnath was maintainable or was barred by Section 47 of the Code of Civil Procedure.

First Appeal No. 304 of 1979, therefore, succeeds. The appeal is allowed. The judgment and decree passed in Special Civil Suit No.87 of 1971 by the learned Joint Civil Judge, Senior Division, Junagadh, is quashed and set aside. Special Civil Suit No. 87 of 1971

is dismissed.

In view of the dismissal of Special Civil Suit No. 87 of 1971, First Appeal No. 303 of 1979 does not survive and is accordingly disposed of. There shall be no order as to costs.

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